No. 84-351



# In the Supreme Court of the United States
## OCTOBER TERM, 1983

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

*Petitioners,*

*v.*

DOUGLAS JAMES SCANLON,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

1. Does the doctrine of soverign immunity as exemplified by the Eleventh Amendment to the United States Constitution bar private actions in federal courts under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) against states and their agencies?

## PARTIES TO THE PROCEEDINGS

Petitioners Atascadero State Hospital and California Department of Mental Health are administrative entities under the aegis of the State of California and pray that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 13, 1984. Respondent is Douglas James Scanlon, an applicant for employment with petitioner first-named above.

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No. _____

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### OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit, filed on June 13, 1984, is reported at 735 F.2d 359 and is reprinted herein, commencing at Appendix page A-1.

Previous thereto, on grounds not related to the question presented herein, this Court on March 19, 1984 granted a petition for writ of certiorari by respondent Scanlon,

vacating a prior decision of the Court of Appeals (677 F.2d 1271 (9th Cir. 1982)) and remanding the matter for reconsideration by the appellate tribunal. 465 U.S. ____, 104 S.Ct. 1583. This Court's Order is reproduced at page A-6 of the Appendix herein. The Court of Appeals' prior Opinion, filed May 24, 1982, is reproduced at Appendix page A-7.

The initial Opinion and Order of the United States District Court for the Central District of California dismissing respondent's complaint was not reported but is set forth at Appendix page A-22.

Recent Orders of the Court of Appeals staying issuance of mandate in these proceedings pending the instant petition are included in the Appendix at pages A-25 and A-26.

## JURISDICTION

The Opinion of the Court of Appeals was entered on June 13, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XI:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

29 U.S.C. §794, as amended Pub.L. 95-602, Title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987:

> "Nondiscrimination under federal grants and programs; promulgation of rules and regulations

"No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committes of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

29 U.S.C. §794a, Pub.L. 93-112, Title V, §505, as added Pub.L. 95-602, Title I, §120, Nov. 6, 1978, 92 Stat. 2982:

"Remedies and attorney fees

"(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a

court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

"(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

"(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

42 U.S.C. §2000d, Pub.L. 88-352, Title VI, §601, July 2, 1964, 78 Stat. 252:

"Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on grounds of race, color, or national origin

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

## STATEMENT OF THE CASE

The decision of the Court of Appeals raises the significant federal question of whether the mere receipt of federal financial assistance under the Rehabilitation Act of 1973 by a state employer subjects that agency to the jurisdiction of the federal district court in a private civil action commenced by a job applicant under section 504 of that Act, notwithstanding the Eleventh Amendment to the United States Constitution and the doctrine of sovereign immunity embodied therein.

This action was commenced on November 21, 1979 by respondent Douglas James Scanlon, who alleged that petitioner Atascadero State Hospital (administered by petitioner California Department of Mental Health) in 1978 refused to employ respondent as a graduate student assistant-recreation therapist solely because of his physical handicap, i.e. diabetes mellitus and lack of vision in one eye. Respondent further alleged that petitioners were recipients of federal financial assistance, and that their action violated section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and pendent State fair employment laws. Monetary, injunctive and declaratory relief were sought.

Petitioners responded to the complaint by moving to dismiss the action on two grounds: (1) that petitioners were immune from suit in federal court in private actions under section 504 by reason of sovereign immunity; and (2) that respondent had failed to allege an essential element for a claim under section 504, to wit, that the federal assistance allegedly received by petitioners was for the primary purpose of providing employment.

The District Court granted petitioners' motion and ordered the action dismissed, holding that the state agencies indeed were protected by the Eleventh Amend-

ment grant of immunity. The court rejected petitioners' second grounds for dismissal. (App. p. A-24.)

The Court of Appeals for the Ninth Circuit, on the other hand, accepted the premise of the aforementioned second grounds and affirmed dismissal on that basis, never reaching the sovereign immunity question. (App. p. A-7.)

In November 1982, respondent petitioned this Court for a writ of certiorari, presenting, in essence, the question of whether, in order for a qualified handicapped person to state a viable claim under section 504, the federal financial assistance alleged to have been received by an employer must have been for the primary purpose of providing employment. (U.S. Sup. Ct. Dock. No. 82-5812.)

This same question was presented in a related case, *Consolidated Rail Corp. v. Darrone* (sub. nom.: *Le Strange v. Consolidated Rail Corp.*), which this Court subsequently accepted for review. (U.S. Sup. Ct. Dock. No. 82-862.) On February 28 of this year the Court handed down its Opinion in the *Consolidated Rail Corp.* case, holding that an employer could be sued under section 504 regardless of the purpose of the federal financial assistance it had received. (465 U.S. ____, 104 S.Ct. 1248.)

Consequently, on March 19, 1984 this Court granted respondent's petition for writ of certiorari, vacated the Court of Appeals decision and remanded the matter for further consideration in light of the *Consolidated Rail Corp.* opinion. (456 U.S. ____, 104 S.Ct. 1583; App. p. A-6.)

On remand, the Court of Appeals for the Ninth Circuit noted the *Consolidated Rail Corp.* decision and found it to be controlling with respect to the issue initially determined on appeal in this action. The court then proceeded

to address the sovereign immunity question previously not decided on appeal. In an Opinion by the Honorable Ben C. Duniway, in which the Honorable Warren J. Ferguson and the Honorable Richard B. Kellam of the United States District Court for the Eastern District of Virginia sitting by designation concurred, the court reversed the District Court and remanded the matter for further proceedings. The court concluded that the Rehabilitation Act of 1973 literally included States as potential defendants in private actions brought by individuals and that petitioners, by allegedly receiving federal funds under said Act, had consented to be sued thereunder. (____F.2d____; App. pp. A-3, 5.)

## REASONS FOR GRANTING THE WRIT

### A. Introduction

This case involves an issue of substantial importance as to which the Court of Appeals for the Ninth Circuit is in direct conflict with the Courts of Appeals for the First and Eighth Circuits. That issue concerns whether States and their agencies may be sued in federal courts by private litigants in actions arising under section 504 of the Rehabilitation Act of 1973, notwithstanding the doctrine of sovereign immunity as exemplified by the Eleventh Amendment to the United States Constitution.

The import of the decision below is to subject to federal court jurisdiction an entirely new class of defendants, absent any expression of Congressional intent to do so and contrary to the decisions of this Court on the issue of sovereign immunity. The holding that States are included within the class of potential defendants under the Rehabilitation Act constitutes an effort by the Court of Appeals to change the standard by which Congressional abrogation of States' immunity traditionally has been measured; and

the finding that the mere acceptance of federal financial assistance under the Act constitutes an implied consent to suit contravenes settled and recent pronouncements by this Court on that point.

It is respectfully requested by petitioners that this Court should review the decision of the Ninth Circuit and, after review, reverse that decision.

### B. The Ninth Circuit's Decision Is In Direct Conflict With Decisions of the Courts of Appeals for the First and Eighth Circuits

In *Ciampa v. Massachusetts Rehabilitation Com'n.*, 718 F.2d 1, 3 (1st Cit. 1983), the Court of Appeals for the First Circuit noted that the test for determining whether Congress in specific legislation intended to abrogate States' Eleventh Amendment immunity has been consistently applied by this Court in cases exemplified by *Quern v. Jordan*, 440 U.S. 332, 343-345 (1979), *Edelman v. Jordan*, 415 U.S. 651, 672-673 (1974), and *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 285 (1973).

In summary, that test requires a showing of unequivocal Congressional intent to override States' immunity, either by explicit language in the statute under review or by such overwhelming implication from the text as would leave no room for any other reasonable construction. The intent to abrogate will not be found in implication or inference.

Applying this standard to private civil actions under section 504 of the Rehabilitation Act of 1973, the *Ciampa* court found that neither the statute nor relevant legislative history indicated that Congress even considered the issue of, let alone intended to override, States' Eleventh Amendment immunity. 718 F.2d at 3.

Relying upon this Court's holding in *Florida Dept. of Health v. Fla. Nursing Home Assn.*, 450 U.S. 147, 150 (1981), the court in *Ciampa* also rejected the argument that the state had waived its sovereign immunity by accepting federal financial assistance. 718 F.2d at 3-4.

In another section 504 case, the Court of Appeals for the Eighth Circuit in *Miener v. State of Mo.*, 673 F.2d 969 (1982), *cert. den.*, 459 U.S. 909, 916 (1982), also upheld States' immunity in such cases, employing much the same analysis and Supreme Court authorities as relied upon in *Ciampa,* and dismissed the plaintiff's claims for monetary, injunctive and declaratory relief.

To the contrary, and standing alone, the Court of Appeals below has held that the Rehabilitation Act literally includes States within the class of defendants against whom private suits may be brought (App. p. A-3), and that a State which accepts federal financial assistance under that Act implicitly consents to such suits. (App. p. A-5.)

In reaching these conclusions the Ninth Circuit acknowleges that it is in direct conflict with the First (*Ciampa*) and Eighth (*Miener*) Circuits, but states that it disagrees with those decisions. (App. p. A-5.)

Petitioners respectfully submit that this conflict should be resolved by this Court through writ of certiorari review and, as argued below by petitioners, upon such review the Ninth Circuit decision should be reversed as erroneous.

### C. The Ninth Circuit Decision on the Sovereign Immunity Question Is Erroneous Both in Its Analysis and Conclusions

The deference to be accorded the doctrine of sovereign immunity and the breadth of its continuing vitality as a check on federal judicial power were recently iterated by

this Court in *Pennhurst State School & Hosp. v. Halderman* ____ U.S. ____, 104 S.Ct. 900, 907 (1984):

> " 'That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given:* not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.' (*Ex parte State of New York No. 1,* 256 U.S. 490, 497 (1921) (emphasis added)."

This bar of sovereign immunity inures irrespective of the nature of the relief sought, whether in law or equity. *Pennhurst, etc., supra,* 104 S.Ct. at 908; *Cory v. White,* 457 U.S. 85, 90-91 (1982).

As noted in the *Pennhurst* decision, *supra,* 104 S.Ct. at 907, Congress may in cases of predominant federal interests abrogate States' immunity (see *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976)), or a State may waive its immunity and consent to suit in federal court (see *Parden v. Terminal R. Co.,* 377 U.S. 184 (1964)). Before declaring that sovereign immunity has been swept away in either of these circumstances, however, this Court has consistently required a most stringent, empirical demonstration of such intent and/or consent.

When this Court's decisions in the area of sovereign immunity are examined, as petitioners now propose to do, it is submitted that it becomes manifest that in the context of section 504 suits there has been no abrogation of sovereign immunity by Congress, nor has there been any waiver of such immunity by these petitioners. At the same time, petitioners respectfully suggest that in reaching the conclusions that it did, the Ninth Circuit erroneously analyzed this Court's opinions on the issue, resulting in a mixing of precepts and decisions on the questions of abrogation and waiver in a fashion which confuses and devitalizes the two.

Any analysis of the case law on the subject of sovereign immunity must proceed from the general proposition that the history and tradition of that doctrine and its exemplification in the Eleventh Amendment stand as a barrier, by reason of which a federal court is not competent to render judgment against a nonconsenting State. The question then becomes whether Congress in the legislation under scrutiny "has brought the States to heel, in the sense of lifting their immunity from suit in federal court." *Employees v. Missouri Public Health Dept., supra,* 411 U.S. at 283-284.

It is not enough that States may be thoroughly enmeshed in the statutory scheme or even explicitly mentioned as subject to various of the legislative provisions. (See *Florida Dept. of Health v. Fla. Nursing Home Assn., supra*, 450 U.S. 147.) Rather, this initial inquiry seeks to determine "the threshold fact of Congressional authorization to *sue* a class of defendants which *literally* includes States." *Edelman v. Jordan, supra,* 415 U.S. at 672. (Emphases added.) It is important to emphasize that this initial or threshold finding concerns Congressional intent to sweep away States' immunity *from suit in federal courts*, not an intent that States otherwise be covered by

the subject legislation.. *Employees v. Missouri Public Health Dept., supra,* 411 U.S. at 285-286.

In *Quern v. Jordan, supra*, 440 U.S. at 345, this Court cast this threshold search as one which looks to *explicit* and *clear* language on the face of the legislation that the immunity of the States has been abrogated, or to a legislative history which focuses directly on the question of state liability and which shows that Congress *considered* and firmly *decided* to abrogate Eleventh Amendment protection.

The test employed in determining abrogation is a strict one and was recently repeated, as was the underlying policy, in *Pennhurst State School & Hosp. v. Halderman, supra,* 104 S.Ct. at 907:

> ". . . Similarly, although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, . . . we have required an *unequivocal expression* of congressional intent . . . Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." (First emphasis added.)

The Rehabilitation Act of 1973 (29 U.S.C. § 701, *et seq.*) is *silent* with respect to States being liable in federal court private actions. The relevant legislative history likewise gives no indication of any Congressional intention to extinguish States' sovereign immunity. As the court in *Ciampa v. Massachusetts Rehabilitation Com'n., supra*, 718 F.2d at 3, remarked, these sources of intent indicate

that Congress did not even *consider* the issue of States' immunity.[1]

The Ninth Circuit below acknowledged these facts when it stated in its Opinion:

> "This is not a case in which the Act expressly provides for a state liability, as some statutes do... Nor is this a case in which the legislative history makes it clear that Congress intended to make states liable, regardless of their consent." (App. p. A-3.)

Petitioners submit that this finding of silence should end the inquiry on abrogation, just as it did in *Quern v. Jordan,*[2] *Edelman v. Jordan* and *Employees v. Missouri.*

The *Employees* decision is of particular application. There, the argument was made that Congress had indeed lifted States' immunity under the Fair Labor Standards Act of 1938. (29 U.S.C. § 216(b).) This Court noted in its opinion that, just as here with respect to the Rehabilitation Act of 1973, the State defendants in that case were *literally* covered by the Act.[3] What was found lacking,

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[1]In fact, as mentioned in *Ciampa, supra,* 718 F.2d at 3, Congress did not even provide for a private cause of action under the Act, although all indications are that an implied remedy does exist. See *Consolidated Rail Corp. v. Darrone, supra,* 104 S.Ct. at 1252, n. 7, and *Miener v. State of Mo., supra,* 673 F.2d at 973, and cases collected therein. Petitioners, while not conceding the point, have not raised below the issue of whether a private cause of action exists.

[2]". . . But we need not reach the question whether an express waiver is required because neither the language of the statute nor the legislative history discloses an intent to overturn the States' Eleventh Amendment immunity by imposing liability directly upon them." *Quern v. Jordan, supra,* 440 U.S. at 344, n. 16.

[3]In fact, the statutory provisions examined in *Employees* went far beyond anything found in the Rehabilitation Act of 1973. In relevant part, section 216(b) of the FLSA provided: "Any employer who

however, was any indication by *clear language* that Congress intended to subject States *to suit in federal courts* notwithstanding the Eleventh Amendment. 411 U.S. at 285.

The Ninth Circuit decision at bar is directly contrary to the holding in *Employees* and other decisions of this Court. While recognizing that the Court's analysis is governed by the inquiry announced in *Edelman*, that is: Does the subject enactment by its terms authorize *suit* by designated plaintiffs against a general class of defendants which *literally* includes States or their instrumentalities (App. p. A-3), the Opinion below proceeds to either ignore or misconstrue the critical terms of that inquiry as emphasized just above. The Rehabilitation Act does *not* authorize private *suit* by anyone against anyone.[4] Perforce, the Act does not provide reference to a general class of defendants which *literally* includes States or their instrumentalities.

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violates the provisions . . . of this Act shall be liable to the employee or employees affected. . . Action to recover such liability may be maintained in any court of competent jurisdiction. . . ." 29 U.S.C. §216(b). As mentioned earlier herein, the Rehabilitation Act does not even mention a private remedy, let alone authorize jurisdiction in all courts.

[4]Section 505(a)(2) of the Rehabilitation Act (29 U.S.C. §794a(a)(2)) *does* make available to handicapped persons . . . aggrieved by recipients of federal financial assistance the remedies, procedures and rights provided under Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq.). Again, though, Title VI by its terms also does not authorize private *suits*, or *literally* include States as potential defendants. Only recently has this Court confirmed the existence of an *implied* cause of action under Title VI, *Guardians Ass'n. v. Civ. Serv. Com'n. of City of N.Y.*, ____ U.S. ____, 103 S.Ct. 3221 (1983); and in the only reported appellate decision dealing with the issue of sovereign immunity in the context of a Title VI action, States' immunity has been upheld. (*Bakersfield City Sch. Dist. of Kern Cty. v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979).)

Instead, the Ninth Circuit focuses on the observation that the Rehabilitation Act "contains extensive provisions under which states are the express intended recipients of federal assistance."[5] (App. p. A-3.) This, of course, is no different a set of circumstances, nor less a degree of State involvement in the overall statutory scheme, than was unsuccessfully presented to this Court in the *Employees* and *Florida Dept. of Health* cases, *supra.*

The Ninth Circuit's citation of *Petty v. Tennessee-Missouri Comm'n.*, 359 U.S. 275 (1959) and *Parden v. Terminal R. Co., supra*, 377 U.S. 184, as authority for its resolution of the threshold abrogation question, demonstrates that it has mixed this Court's decisions on waiver with those concerning abrogation.

*Petty* was a *waiver* or "consent to be sued" case. The States of Tennessee and Missouri formed a compact to build a bridge and operate ferries across the Mississippi River. In that compact, submitted for approval by Congress, the States stipulated that they would have the power to sue and be sued in their own names. In granting its consent to

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[5]The Opinion also notes that an implementing regulation (45 C.F.R. § 84.3(f)) broadly defines recipients to include States. Neither this nor any other relevant regulation, however, in any way addresses suits in federal courts or States' immunity. The regulations *do* concern a number of issues and procedures under the Act, including governmental sanctions, wherein the inclusion of States as "recipients" is germane. (See, e.g., 45 C.F.R. §84.6.) To infer that 45 C.F.R. § 84.3(f) lends support to a finding that sovereign immunity has been abrogated is to deem those regulations far more pervasive weight than even the promulgating federal agency would accord them. In paragraph 8, subpart A, of Appendix A to 45 C.F.R. Part 84, "Analysis of Final Regulation," it is stated: "Private rights of action. . . To confer such a [private] right [of action] is beyond the authority of the executive branch of Government." (Inserts added.) Suffice to say, that to confer or imply by regulation a right to sue States in federal courts, notwithstanding sovereign immunity, would constitute an even greater ultra vires effort.

the arrangement, Congress added the proviso that nothing contained in said compact shall be construed to affect, impair or diminish any right, power or jurisdiction of any court of the United States. 359 U.S. at 277.

When the Eleventh Amendment was raised in a subsequent action under the Jones Act, this Court had little difficulty in *Petty* in finding a clear waiver of immunity:

> "The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached. So if there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition attached by Congress is accepted and acted upon by the two States." 359 U.S. at 281-282.
>
> ". . . [T]he States [by] accepting [those conditions] . . . waived any immunity from suit which they otherwise might have." 359 U.S. at 280 (Inserts added.)

*Parden*, likewise, was a case concerned with waiver, not abrogation.[6] As this Court noted at the outset of the Opinion in that case:

> ". . . [T]he State's freedom from suit . . . does not protect it from a suit to which it has *consented*. . . We think [defendant] Alabama has *consented* to the present suit." 377 U.S. at 186. (Insert and emphases added.)

Having found Congressional intent to abrogate States' immunity clear from both the language of the Act itself and

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[6]"The *Parden* case in final analysis turned on the question of waiver." *Employees v. Missouri Public Health Dept., supra*, 411 U.S. at 282.

its legislative history, this Court in *Pardon* held the situation analogous to that presented in *Petty*. As a result, Alabama, by operating an interstate railroad after enactment of the Federal Employers' Liability Act and its concomitant conditions of amenability to suit in federal courts, was found to have consented to such suits. 377 U.S. at 192-196.

In both the *Petty* and *Parden* decisions, then, as was the case in *Fitzpatrick v. Bitzer, supra*, 427 U.S. 445, the Court was satisfied that Congressional intent to *abrogate* immunity was clear, and devoted its analysis to the question of *waiver*. Here, the Ninth Circuit erroneously relies on the holdings of those cases to support its finding, in the first instance, of a Congressional intent to *abrogate*.

Even bypassing the abrogation question for purposes of argument, the Ninth Circuit's conclusion that petitioners, "if [they have] . . . participated in and received funds from programs under the Rehabilitation Act, . . . [have] implicitly consented to be sued as . . . recipient(s) under 29 U.S.C. § 794" (App. p. A-5), also runs contrary to this Court's teachings on the issue of *waiver*. Although this Court has declined to pursue any examination of the waiver question when the fact of abrogation is initially found lacking (see fn. 2, *supra*), the cases which *have* found it necessary to address that issue clearly demonstrate the lower court's error.

In *Florida Dept. of Health v. Fla. Nursing Home Assn., supra*, 450 U.S. at 150, for instance, this Court held that *neither participation in and receipt of federal assistance under a government program, nor a concomitant agreement to obey federal law, is sufficient to waive the protection of the Eleventh Amendment.* Moreover, in that case the Court was called upon to examine the Medicaid Act (42 U.S.C. § 1396 *et seq.*), a statutory

scheme which contains a vastly greater degree of participation on the part of member States and attendant federal control thereover, including requiring an agreement by States to obey federal law, than is found in the Rehabilitation Act.

To the same effect is the following statement from *Edelman v. Jordan, supra*, 415 U.S. at 673:

> "The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts."

The Ninth Circuit concludes, however, that "in this case, there is more than the 'mere fact' of state participation" (App. p. A-5), but the decision never identifies what "more" there is. If the basis for this comment is the same as the court below relied upon in concluding that abrogation was intended, then the finding of waiver is similarly wanting, for the test in determining waiver is no less strict:

> " '. . . [W]e will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Florida Dept. of Health v. Fla. Nursing Home Assn., supra*, 450 U.S. at 150, quoting from *Edelman v. Jordan, supra*, 415 U.S. at 673.

Furthermore, to rely on the decisions in *Petty* and *Parden* on this waiver issue also would be misplaced. As discussed previously herein, where the statute involved does not by its terms authorize suit literally against States, the *Parden* and *Petty* analyses have no application. This

was a specific holding of the *Edelman* decision. 415 U.S. at 672. Moreover, in *Petty*, there was a finding of an *express* waiver by virtue of the States' execution of a sue-and-be-sued provision and the acceptance by those States of a Congressional condition of amenability to suit in federal court, 359 U.S. at 277-280. In *Parden*, while there was no *express* waiver, the Court alluded to the *unique* legislative and case law precedent respecting governmental control over interstate rail carriers, by virtue of which the Court felt constrained to find a waiver, setting that case apart from all others on the issue of waiver:

> " 'The fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included. (*California v. Taylor* (1957)) 353 U.S., at 564.'
>
> ". . . Thus we could not read the FELA differently here without undermining the basis of our decision in *Taylor*," 377 U.S. at 189. (Insert added.)

That the *Parden* decision stands as a unique and isolated exception to the settled rule on waiver of immunity has been noted by this Court:

> ". . . The dramatic circumstances of the *Parden* case, which involved a rather isolated state activity can be put to one side." *Employees v. Missouri Public Health Dept., supra*, 411 U.S. at 285.
>
> ". . . For me at least, the concept of implied consent or waiver relied upon in *Parden*

> approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver." *Id* at 296, concurring opinion of Justice Marshall.

Petitioners submit, therefore, that the Ninth Circuit decision is in error as to its analyses and conclusions respecting both the finding of abrogation and the finding of waiver under the Rehabilitation Act. Given the impact that such a decision may have upon future litigation under the Act, it is respectfully requested that this Court agree to review and reverse same.

## CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that a Writ of Certiorari be issued to review the decision of the Court of Appeals for the Ninth Circuit in this case.

DATED: _____.

Respectfully submitted,

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# APPENDIX

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| DOUGLAS JAMES SCANLON,<br>Plaintiff-Appellant,<br>vs.<br>ATASCADERO STATE HOSPITAL and CALIFORNIA DEPARTMENT OF MENTAL HEALTH,<br>Defendants-Appellees. | No. 80-5201<br>(D.C. No. 79-4523-MRP)<br>OPINION |

Appeal from the United States District Court
for the Central District of California
Honorable Mariana R. Pfaelzer, District Judge, Presiding
Argued September 15, 1981 and Submitted October 15, 1981
Decided May 24, 1982, 677 F.2d 1271
Certiorari Granted; Vacated and Remanded March 19, 1984
S.C. No. 82-5812

Before: DUNIWAY and FERGUSON, Circuit Judge
and KELLAM,* District Judge

DUNIWAY, Circuit Judge:

We consider for the second time Scanlon's claim of employment discrimination against the handicapped under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The district court dismissed the action on the ground of state immunity under the Eleventh Amendment. We reverse.

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*The Honorable Richard B. Kellam, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

## I. BACKGROUND.

Scanlon alleged that he suffers from diabetes mellitus and lack of vision in one eye, that California's Atascadero State Hospital denied him a job as a graduate student assistant, and that this was discrimination in employment violating the Act. The state received federal financial assistance for the hospital under the Act. The defendants moved to dismiss on two grounds: (1) that § 794 does not apply to employment discrimination unless a primary objective of the federal financial assistance is to provide employment, and (2) that the Eleventh Amendment barred Scanlon's federal claim. The district court dismissed on the Eleventh Amendment ground. We affirmed the dismissal, but on the ground that there can be no private claim for relief under § 794 unless a primary objective of the federal financial assistance is to provide employment. *Scanlon v. Atascadero State Hospital*, 9 Cir., 1982, 677 F.2d 1271, 1272. The Supreme Court granted certiorari, vacated our judgment, and remanded for further consideration in the light of *Consolidated Rail Corporation v. Darrone*, 1984, ___ U.S. ___, 52 USLW 4301. *Scanlon v. Atascadero State Hospital*, 1984, ___ U.S. ___, 52 USLW 3686. *Consolidated Rail* is squarely in point on the § 794 question, and is contrary to our previous opinion.

We did not reach the Eleventh Amendment question in our opinion, 677 F.2d at 1272, but must do so now. *Consolidated Rail* did not touch on the issue of state immunity. No state or state agency was a defendant there.

## II. STATE IMMUNITY UNDER THE ELEVENTH AMENDMENT.

Section 794 of the Rehabilitation Act broadly bars "discrimination under any program or activity receiving

federal financial assistance . . ." and § 794a(a)(2) provides remedies, procedures, and rights against "any recipient of Federal assistance. . . ." The Act contains extensive provisions under which states are the express intended recipients of federal assistance. *E.g.*, § 720 *et seq. Accord* 45 C.F.R. § 84.3(f) (implementing regulations broadly define "recipient" to include "any state or its political subdivision"). If states receive federal assistance under the statute, they plainly fall within the defined class of potential defendants.

The Eleventh Amendment of the United States Constitution broadly bars federal court actions by private parties, including actions by parties who are citizens of the state, against states and state agencies. *See generally Pennhurst State School and Hospital v. Halderman*, 1984, ____ U.S. ____, ____-__, (Jan. 23, 1984, slip op. at 6-10).

Section 5 of the Fourteenth Amendment gives Congress "power to enforce [its provisions] by appropriate legislation." The question is whether Congress has done so in the Act that we are considering, where consent of the state can be inferred. We conclude that it has.

This is not a case in which the Act expressly provides for state liability, as some statutes do. *See, e.g., Fitzpatrick v. Bitzer,* 1976, 427 U.S. 445, 447. Nor is this a case in which the legislative history makes it clear that Congress intended to make states liable, regardless of their consent. *See, e.g., Hutto v. Finney*, 1978, 437 U.S. 678, 693-94.

Rather, this is a case in which a "congressional enactment . . . by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities," and "the State by its participation in the program authorized by Congress had in effect consented to the abrogation of

that immunity." *Edelman v. Jordan*, 1974, 415 U.S. 651, 672. *Edelman* was not such a case because "the threshold fact of congressional authorization to sue a class of defendants which literally includes states [was] wholly absent." *Id.*

Other decisions of the Supreme Court apply the principle. *Petty v. Tennessee-Missouri Bridge Commission*, 1959, 359 U.S. 275, was an action under the Jones Act, 46 U.S.C. § 688 *et seq.*, which authorized personal injury actions by any seaman against his employer. *Id.* § 688. The states operated ferryboats under a compact to which Congress consented with a proviso that, the Court held, created a waiver of Eleventh Amendment immunity. In *Parden v. Terminal Railway of the Alabama State Docks Department*, 1964, 377 U.S. 184, the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, provided that "*Every* common carrier by railroad . . . shall be liable in damages. . . ." *Id.* § 51 (emphasis added). Under this broad statutory definition of potential defendants, a state's subsequent voluntary operation of a railroad constituted consent to suit.

We have recently decided two cases in which we applied the same principle. In *Mills Music, Inc. v. State of Arizona*, 9 Cir., 1979, 591 F.2d 1278, 1283-85, the federal statute, the old Copyright Act, former 17 U.S.C. §1 *et seq.*, provided broadly that "*any person . . . shall be liable. . . .*" *Id.* § 101 (emphasis added) (compare present 17 U.S.C. § 50(a): "Anyone who violates . . ."). We held that the state agency, by using a copyrighted song to promote a state fair, voluntarily engaged in regulated activity and thus waived its Eleventh Amendment immunity. In *Department of Education, State of Hawaii v. Katherine D.*, 9 Cir., 1984, 727 F.2d 809, 818-19, the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*, a statute often associated with the Rehabilitation Act, provided a broad private right of action, *id.* § 1415(e)(2),

in a context where state agencies would "inevitably" be parties to any dispute. We held that the state agency, by applying for and receiving federal funds under *id.* § 1412, waived its Eleventh Amendment immunity and consented to suit.

Scanlon expressly alleged that Atascadero State Hospital is a recipient of federal financial assistance under the Rehabilitation Act., *see* Complaint ¶ 4 [ER 3], and in reviewing the dismissal of his action we must assume this to be the case.

We decline to follow cases holding that the Eleventh Amendment bars actions against states under § 794, such as *Ciampa v. Massachusetts Rehabilitation Commission,* 1 Cir. 1983, 718 F.2d 1, 3-4, and *Miener v. State of Missouri, Cir., 1982, 673 F.2d 969, 979-980-82.* We disagree with those cases' reliance on *Edelman* and *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association,* 1981, 450 U.S. 147, in holding that state acceptance of Rehabilitation Act funds does not waive Eleventh Amendment immunity with respect to suit under § 794. As we have seen (p.4) *supra, Edelman* itself distinguishes a case like this one. 415 U.S. at 672. *Florida Dep't of Health* is similar to *Edelman.* 450 U.S. at 150. In this case, there is more than the "mere fact" of state participation and, as we have shown, a different standard of waiver applies. *See Katherine D.,* 727 F.2d at 819.

We conclude that the Eleventh Amendment does not bar Scanlon's action because the state, if it has participated in and received funds from programs under the Rehabilitation Act, has implicitly consented to be sued as a recipient under 29 U.S.C. § 794.

The judgment is reversed and the action is remanded to the trial court for further proceedings consistent with this opinion.

**Douglas James SCANLON, petitioner, v. ATASCADERO STATE HOSPITAL and California Department of Mental Health, No. 82-5812.**

Case below, 677 F.2d 1271.

March 19, 1984. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Consolidated Rail Corporation v. Darrone*, 465 U.S. ____, 104 S.Ct. 1248, 78 L.Ed.2d ____ (1984).

Douglas James SCANLON,

*Plaintiff-Appellant,*

*v.*

ATASCADERO STATE HOSPITAL, CALIFORNIA DEPARTMENT OF MENTAL HEALTH, *Defendants-Appellees.*

No. 80-5201

United States Court of Appeals
Ninth Circuit

Argued Sept. 15, 1981

Submitted Oct. 15, 1981.

Decided May 24, 1982.

Plaintiff, who suffered from diabetes and lack of vision in one eye, brought suit alleging that he was denied a job as graduate assistant at hospital in violation of section of Rehabilitation Act and various California statutes. The United States District Court for the Central District of California, Mariana R. Pfaelzer, J., dismissed the action, and plaintiff appealed. The Court of Appeals, Duniway, Circuit Judge, held that (1) order was appealable, and (2) complaint did not state claim upon which relief could be granted.

Affirmed.

Ferguson, Circuit Judge, filed a dissenting opinion.

Appeal from the United States District Court for the Central District of California.

Before DUNIWAY and FERGUSON, Circuit Judges, and KELLAM, District Judge.

DUNIWAY, Curcuit Judge: We affirm the dismissal of this action, brought under 29 U.S.C. §794.

## I. FACTS.

Scanlon alleges that he suffers from diabetes mellitus and a lack of vision in one eye, that he was denied a job as a graduate student assistant at Atascadero State Hospital, and that this was discrimination in employment contrary to § 504 of the Rehabilitation Act, 29 U.S.C. § 794 and to various California statutes. The hospital moved for dismissal of the complaint, arguing (a) that § 794 does not apply to employment discrimination unless a primary objective of the federal financial assistance is to provide employment, and (b) that Scanlon's claims were barred by the Eleventh Amendment. The district court rejected argument (a) but accepted argument (b), and on that ground dismissed the § 794 claim and the pendent state claims.

## II. Appealability of the Order

The court's order merely dismissed the complaint; there is no judgment dismissing the action. Ordinarily, an order granting a motion to dismiss under rule 12(b)(6), F.R. Civ.P., carries with it a right to amend under rule 15(a), and thus is not an appealable final judgment. Here, however, the ruling was on a ground not curable by amendment, and it is clear that the court intended to dispose of the action. See *Scott v. Eversole Mortuary*, 9 Cir., 1975, 522 F.2d 1110, 1112. The order is appealable. However, the better practice would have been to enter a judgment of dismissal.

## II. The Merits.

We affirm on the ground that the complaint does not and cannot state a claim upon which relief can be granted. We do not reach the question of the applicability of the Eleventh Amendment. Title 29 U.S.C. § 794 now reads in pertinent part as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

In *Trageser v. Libbie Rehabilitation Center, Inc.*, 4 cir., 1978, 590 F.2d 87, 89, the Fourth Circuit decided that a private action under § 794 to redress employment discrimination cannot be maintained unless a primary objective of the federal financial assistance is to provide employment. The Second and Eighth Circuits have followed. *United States v. Cabrini Medical Center,* 2 Cir., 1981, 639 F.2d 908; *Carmi v. Metropolitan St. Louis Sewer District,* 8 Cir., 1980, 620 F.2d 672. See also *Simpson v. Reynolds Metals Co., Inc.*, 7 Cir., 1980, 629 F.2d 1226, 1232, 1234. For the reasons stated in *Trageser, supra,* we conclude that the order appealed from is correct.

Affirmed.

FERGUSON, Circuit Judge, dissenting:

My analysis of the Rehabilitation Act of 1973, of the 1978 Amendments to that Act, and of the legislative and administrative material which should guide our interpretation of that Act convinces me that the majority's decision in this case in in error. Accordingly, I dissent.

The issue in this case is whether Congress, by amending the Rehabilitation Act to "make available" the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964, "[1] actually limited, in a drastic way, the remedies that were already available to persons aggrieved under § 504 of the Act. No support for such a

view can be found in the Act, in the 1978 Amendments, or in the relevant legislative and administrative materials. Indeed, the only support that exists is the decision of the Fourth Circuit in *Trageser v. Libbie Rehabilitation Center,* 590 F.2d 87 (4th Cir. 1979). Neither that decision, nor those of the other courts that have followed it, can withstand scrutiny. The *Trageser* decision has been criticized by the Senate Committee on Labor and Human Resources,[2] by HEW,[3] by the Department of Justice,[4] and by commentators.[5]. It should not be followed by this court.

## I. BACKGROUND

### A. The Rehabilitation Act

Section 504 of the Act prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance." 29 U.S.C. §794. Prior to the enactment of the 1978 Amendments, this section had been held to create a private right of action for individuals aggrieved by employment discrimination on the basis of handicap. See, *e.g., Whitaker v. Board of Higher Education,* 461 F. Supp. 99, 106-08 (E.D.N.Y. 1978); *Drennon v. Philadelphia Gen. Hosp.,* 428 F.Supp. 809, 815-16 & n.6 (E.D.Pa. 1977). The Department of Health, Education and Welfare had issued regulations implementing §504 which prohibit employment discrimination against the handicapped by all recipients of federal financial assistance. *E.g.,* 45 C.F.R. §84.11 (1977).[6] HEW also noted, in the analysis of its regulations, the existance of case law holding that §504 creates a private right of action. 45 C.F.R. §84 App. A subpar. 8 (1977). The conclusion reached by all of these authorities, that §504 prohibits employment discrimination against the handicapped by every recipient of federal financial assistance, is supported by the language and clear intent of the Act itself. Section 504 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or *be subject to discrimination under* any program or activity receiving Federal financial assistance.

29 U.S.C. §794 (emphasis added). Notably, the statute does not read ". . . or be subject to discrimination other than employment discrimination," not does it include any words of limitation characterizing the purpose which the federal funding must have before the rights guaranteed by §504 are available. Furthermore, a primary focus of the Rehabilitation Act was employment for the handicapped. Its purpose was "to see that these [handicapped] individuals do receive the services that they need, particularly that maximum efforts are made to develop a vocational goal for them." S.Rep. No. 318, 93d Cong., 1st Sess. 18, reprinted in [1973] U.S. Code Cong. & Ad. News 2076, 2092. The achievement of that goal is plainly impeded by the existence of discriminatory hiring practices in either the public or the private sector, and it would be odd indeed for Congress to condone such discrimination in programs administered with the help of federal funds.

### B. The 1978 Amendments and Title VI

The courts recognized, under *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), that Congress had intended a private right of action to enforce the substantive rights specified in §504.[7] *Lloyd v. Regional Transp. Authority,* 548 F.2d 1277, 1284-87 (7th Cir. 1977). However, the 1973 Act did not spell out federal department and agency procedures adequate to secure the enforcement of the rights it guaranteed, and federal

agencies were slow to enforce those rights. See Comment, "Employment Discrimination Act Against the Handicapped," 54 N.Y.U.L. Rev. 1173, 1192 (1979) [hereinafter cited as "Employment Discrimination"]. See also Linn, "Uncle Sam Doesn't Want You: Entering the Federal Stronghold of Employment Discrimination against Handicapped Individuals." 27 De Paul L. Rev. 1047 (1978). As a result, first Congress, and then President Ford, directed federal agencies to promulgate enforcing regulations. "Employment Discrimination," *supra,* at 1192. The resulting regulations did not distinguish among federally funded programs on the basis of the purpose of the federal funding. Instead, employment discrimination against the handicapped is prohibited in all such programs. See, e.g., 45 C.F.R. §84.11 (1977). Congress subsequently enacted the 1978 amendments, which were intended to codify as a statutory requirement the "Existing HEW practice" embodied in its regulations at 45 C.F.R. parts 84, 85. S.Rep.No. 890, 95th Cong., 2d Sess. 19 (1978), U.S. Code Cong. & Admin.News 1978, p. 7312. As already noted, the language of that enactment "made available" the procedures of Title VI to aid in the enforcement of §504.

Title VI, which prohibits racial discrimination in federally funded programs, provides as its most dramatic remedy a cutoff of federal funds to an offending program. 42 U.S.C. §2000d-1. Title VI also contains a provision which limits enforcement by a federal agency or department in the event of employment discrimination based on race: "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." Section 604 of the Civil Rights Act of 1964, 42 U.S.C. §2000d-3.

The principal issue presented to us today is whether the 1978 Amendments in addition to explicitly making available to §504 claimants the remedies of Title VI, also carried over the limitation on Title VI remedies effectuated by §604. The crucial secondary issue concerns the proper scope of that limitation in the §504 context, if indeed it was carried over at all by the 1978 Amendments. The *Trageser* court held that the §604 limitation is broad enough in its customary title VI field of action to cut off all remedies available under Title VI when it applies at all. It held that the limitation was carried over in the same broad form by the 1978 Amendments, and concluded that, as amended, §504 provides no remedy for employment discrimination unless the federal funding is provided for the purpose of an employment program.

Analysis shows that the *Trageser* court was wrong in each step of its syllogism. *Trageser* is wrong in its broad construction of §604 in the Title VI context, wrong that the §604 limitation was carried over to the Rehabilitation Act by the 1978 Amendments, and wrong in its conclusion that there is no remedy under §504 for discrimination against the handicapped in a program receiving federal funds unless the purpose of those funds is for an employment program.

## II. THE *TRAGESER* INTERPRETATION OF THE 1978 AMENDMENTS IS INCORRECT.

### A. The Section 604 Limitations to Title VI Remedies Does Not Limit the Private Right of Action for Race-Related Employment Discrimination.

When Title VI was enacted, its sponsors clearly perceived the crucial distinction between the substantive right it codified and the remedy it provided. That sub-

stantive right, which belongs to individuals, can be remedied by private administrative action.

> Senator Humphrey emphasized that individuals can go to court to enforce their rights and that the remedy of funding termination was simply one method for enforcing Title VI rights — "the method for . . . governmental *agencies* and activities covered by [the statute]. Senator Case supported Senator Humphrey's view that the substantive rights established in Title VI "are not limited by the limiting words of [its remedial provisions]."

Employment Discrimination, *supra*, 54 N.Y.U.L.Rev. at 1189, *citing* 110 Cong. Rec. 5255 (1964) (emphasis added). Indeed, that distinction is plain on the face of § 604. If Congress has intended by § 604 to eliminate all remedies under Title VI for employment discrimination except where the purpose of the federal funding is employment, it could simply have legislated that nothing in Title VI "shall be construed to authorize action under this subchapter with respect to any employment practice . . . ." But that is not what § 604 says. It says that nothing in Title VI "shall be construed to authorize action under this subchapter *by any department or agency* with respect to any employment practice. . . ." 42 U.S.C. § 2000d-3 (emphasis added). The *Trageser* court, without any analysis, simply read these words out of the statute.[8] The Ninth Circuit has never ruled on this question. I am not persuaded that we should defer to the "reasoning" of the *Trageser* court on this point, because I do not find any reasoning in *Trageser* on this point. I would adhere to the plain language of the statute, and hold that the § 604 limitation on Title VI only applies to enforcement actions by federal agencies and departments. When § 604 is read in this way, it is clearly not a bar to the

present action, even if, as I doubt, its limitation is to be applied to actions under the Rehabilitation Act.

### B. The 1978 Amendments Did Not Make the §604 Limitation on Title VI Enforcement Applicable to §504.

The language of §120(a) of the 1978 Amendments gives no clue that Congress believed it was limiting the existing remedies under §504. It simply makes no sense that by using language which purports to "make available" the remedies of Title VI, Congress actually intended to deprive the handicapped of a crucial remedy. The *Trageser* court, in an apparent attempt to sidestep this obvious objection to its analysis, opined that rather than withdrawing any previously available remedies, the 1978 Amendment "simply confirms a plausible reading of §504 as originally enacted."[9] 590 F.2d at 89. I doubt that the reading proposed by the *Trageser* court is plausible even when nothing but the bare language of the 1978 Act is considered.[10] When the legislative and administrative gloss reviewed above is considered, the *Trageser* reading of the original statute is utterly implausible.

Aside from the clear language of the amendment, there is another reason to doubt that Congress meant to limit §504 in the way *Trageser* concludes it did. The limitation of §604 does not deprive persons aggrieved under Title VI of a remedy. Victims of racially based employment discrimination will still have a remedy under Title VII, unless the employer in question has fewer than fifteen employees. 42 U.S.C. §2000e-2(a)(1), 2000e(b). Those left unprotected by Title VII may still have a private action under Title VI.[11] See *Cannon v. University of Chicago*, 441 U.S. 677, 710-16, 99 S.Ct. 1946, 1964-67, 60 L.Ed.2d 560 (1979); Comment, "Employment Discrimination," *supra*, N.Y.U.L.Rev. at 1185-91. In

contrast, Title VII does not cover handicap discrimination, so the only federal remedies available are those provided by the Rehabilitation Act. The *Trageser* doctrine leaves victims of employment discrimination without any federal remedy at all.

The legislative history of Title VI - which was commonly referred to as the "cut-off-the-funds title" - shows clearly that Congress was anxious not to endanger important federal programs by an over-liberal use of this drastic remedy when other remedies for racially based employment discrimination were readily available. See, *e.g.*, Hearings on H. R. 7152 Before the House Comm. on Rules, 88th Cong. 2d Sess. 379-80 (1964) (Remarks of Rep. Poff); id. at 197-200, 228 (Remarks of Rep. Avery). Congress tempered the remedies of its anti-discrimination legislation to preserve the goals of other important federal programs. By reading § 604 to exclude all remedies, rather than simply agency action, and then importing this broadened exclusion into the Rehabilitation Act, the *Trageser* "reasoning" makes a mockery of Congress's careful and measured approach.

This point was well put by Judge McMillian, concurring in *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672 (8th Cir. 1980). He wrote:

> Even if § 604 is interpreted to restrict individual actions under Title VI, it does not follow that a similar restriction exists on individual actions under the Rehabilitation Act, which encompasses a different kind of statutory scheme than the Civil Rights Act of 1964 . . . . In the Civil Rights Act of 1964, the restriction of individual actions under Title VI merely means that individuals must proceed under Title VII against employment discrimination based on race, national origin, or

> religion. Under the Rehabilitation Act, restriction of individual actions under § 794a (a)(2) would deny any remedy at all to many victims of discrimination.

*Id.* at 679-80 (McMillian, J., concurring). In the context of Title VI, §604 operates to circumscribe, in a considered way, the choice of remedies available for discrimination in violation of that title. In the context of §504 of the Rehabilitation Act, applied *Trageser*-style, §604 operates as a blunderbuss. As Judge Orrick noted in *Hart v. County of Alameda,* 485 F.Supp. 66, 72 (N.D.Cal. 1979), "there is not a single word of legislative history to support [an inference that Congress intended to restrict the scope of Section 504 by importing the restrictions of Sections [604]; indeed, the overwhelming impression created by the legislative history of the 1978 Amendments is that congress intended to expand the remedies available under the Act."

## CONCLUSION

The goal of eliminating discrimination against the handicapped is a laudable one, and one which congress has taken major steps to reach. The court today decides to turn its back on this goal. In so doing, the court flies in the face of the clear language of the Rehabilitation Act and the plain understanding and intent of Congress in enacting and amending that statute. I am therefore compelled to dissent.

## FOOTNOTES

1. Rehabilitation Act of 1973 ["the Act"] section 505(a)(2), 29 U.S.C., section 794a(a)(2), as amended by Comprehensive Rehabilitation Services Amendments of 1978 ["the 1978 Amendments"], section 120 (a).

2. "[*Trageser*] is not consistent with Congress' original and continuing intent that handcapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of [section 504], regardless of the designated use of the federal funds received by the employer in question." S.Rep.No. 316, 96th Cong., 1st Sess. 13 (1979).

3. Comment: Commenters suggested that under [*Trageser*] the Department has no authority to accept or resolve employment discrimination complaints under Section 504.

   Response: The Guidelines reflect the Department's current interpretation of its authority. If and when it must be revised to conform to controlling judicial decisions, the new policy will be announced and will supersede the Guidelines.

   Comments and Recommendations on Proposed Guidelines [now codified at 45 C.F.R. Part 84, Appendix B (1980)], 44 Fed. Reg. 17168, 17174 (1979).

   These guidelines deserve special deference. They were developed in response to Executive Order 11914 (1976), which directed the Secretary of HEW to coordinate the implementation of section 504 by all federal departments and agencies to "issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education and Welfare." The coordinating function was transferred from HEW to the Attorney General by Executive Order 12250 (1980), which revoked Executive Order 11914.

4. As of 1980, the Attorney General was assigned responsibility for coordinating the enforcement of section 594 by federal departments and agencies. Executive Order 12250 (1980). See footnote 3, *supra*. In his analysis of rules promulgated under this authority see 28 C.F.R. sections 42.501-.540 (1980), the attorney general stated that

   > HEW has construed section 504 to prohibit employment discrimination against handicapped persons in all programs receiving Federal financial assistance . . . . Several courts have construed section 504 to cover employment discrimination. . . . To date, two courts of

appeals have taken a narrower view. *See* in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1976), *cert. den.*, 442 U.S. 947 [99 S.Ct. 2895, 61 L.Ed.2d 318] (1979); *Carmi v. Metropolitan St. Louis Sewer District*, No. 79-1325, [620] F.2d. [672] (8th Cir. May 6, 1980). . . .

The [*Trageser*] court's decision appears to rest solely on the language of section 120(a) of the Rehabilitation Act Amendments of 1978, which provides that "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available" to persons aggrieved because of section 504 violations. Accordingly, "in the absence of legislative history to the contrary," the court held that section 120(a) of the Rehabilitation Act Amendments of 1978 incorporated the limitations of Title VI coverage as to employment discrimination. *Id.* at 89.

The court, in its analysis, did not focus on the remedial purpose of section 504 to provide broad protections to handicapped persons. Nor did the court consider the legislative histories of the Rehabilitation Act of 1973 and its subsequent amendments, which reflect the continuing congressional concern for the employment problems of handicapped persons. See, e.g., S.Rep. No. 93-318, 93d Cong., 1st Sess. 18-19, 70 (1973); H.R. Rep.No. 95-1149, 95th Cong., 2d Sess. 16,18, 23-29, 34, 38, 42-43 (1978); S.Rep.No. 95-890, 95th Cong., 2d Sess. 8, 13, 20-21, 27, 36 (1978); H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 80-81, 94-96, 98, 102 (1978). Further, the legislative history of section 120(a), which apparently was not brought to the attention of the court, indicates that the provision was not intended to limit the scope of section 504, but was merely a legislative ratification of HEW'S enforcement procedures under section 504.

Section 120(a) was originally a provision in S. 2600 (95th Cong., 2d Sess., section 118(a) (1978)) the Senate version of the Rehabilitation Amendments of 1978 reported by the Senate Committee on Human Resources on May 15, 1978. The Committee stated, with respect to section 120(a):

It is the committee's understanding that the regulations promulgated by the Department of Health, Education

> and Welfare with respect to procedures, remedies and rights under section 504 conform with those promulgated under Title VI. Thus, *this amendment codifies existing practice as a specific statutory requirement.* (Sen.Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).) (Emphasis added).
>
> In view of the legislative history of the Rehabilitation Act of 1973 and its amendments, HEW's administrative construction, the remedial nature of section 504 and the legislative history of section 120(a), the Department believes that the employment practices of recipients of Federal financial assistance are covered by section 504 regardless of the purpose of the assistance, and the Department's proposed regulations reflect this view (sections 42, 510-42, 513).

Nondiscrimination Based on Handicap in Federally Assisted Programs-Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed. Reg. 37620, 37628 (1980). The analysis goes on to note that in view of *Trageser* and *Carmi,* the provisions relating to employment would not be enforced within the Fourth and Eighth Circuits unless the primary objective of the federal funding is employment. *Id.*

5. E.g., Comment, Employment Discrimination Against the Handicapped: Can *Trageser* Repeal the Private Right of Action? 54 N.Y.U.L.Rev. 1173 (1979).

6. (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies. . . . (3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

   45 C.F.R. section 84.11 (1977). The part applies to "each recipient of Federal financial assistance from the Department of Health, Education and Welfare and to each program or activity that receives or benefits from such assistance." *Id.* section 84.2. There is no provision limiting the application of section 84.11 to programs where the purpose of the Federal funding is employment. These regulations were altered in response to the 1978 amendments. See 45 C.F.R. sections 84.2, 84.11 (1980).

7. Indeed, the Tenth Circuit recently noted: "Every court of appeals and district court, and there have been many, which have considered this question have held that a private right of action exists under the statute." (sic) *Pushkin v. Regents of University of Colorado,* 658 F.2d 1372, 1377 (10th Cir. 1981) (collecting cases).

8. The *Trageser* court states in its opinion that "Title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds unless (1) providing employment is a primary objective of the federal aid, or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid." 590 F.2d at 89 (footnotes omitted). One of the cases cited does hold that the section 604 limitation applies to private actions under Title VI. *Quiroz v. City of Santa Ana,* 18 FEP Cases 1138, 1140 (C.D. Cal. 1978). It offers no reasoning or authority in support of this conclusion. Furthermore, that case merely dismissed the complaint with leave to amend. Since the plaintiff was a CETA worker, his complaint could easily have been amended to avoid the issue altogether. The other cases cited by the *Trageser* court do not support its assertion.

9. Other courts have known better. The Eighth Circuit observed in *Simon v. St. Louis County,* Mo., 656 F.2d 316, 319 n.6 (8th Cir.1981), that *Carmi v. Metropolitan St. Louis Sewer Dist.,* 620 F.2d 672, 674-75 (8th Cir. 1980), which follows the reasoning and adopts the holding of *Trageser,* "limited what had been construed to be a broader private right of action under section 504. . . ." *Id.*

10. Civil rights statutes are to be construed as broadly as their language permits. *Griffin v. Breckinridge,* 403 U.S. 88, 97, 91 S.Ct. 1790, 1796, 23 L.Ed.2d 338 (1971); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 437, 88 S.Ct. 2186, 2202, 20 L.Ed.2d 1189 (1968).

11. See note 8, *supra.* For cases holding that Title VI provides a private right of action see *Cannon v. University of Chicago,* 441 U.S. 677, 696-97 & 696 nn. 20, 21, 99 S.Ct. 1946, 1957-58 & 1957 nn. 20, 21, 60 L.Ed.2d 560.

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

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| DOUGLAS JAMES SCANLON,<br>Plaintiff,<br>v.<br>ATASCADERO STATE HOSPITAL, CALIFORNIA DEPARTMENT OF MENTAL HEALTH,<br>Defendants. | CASE NO.<br>CV 79-4523 MRP<br><br>ORDER GRANTING DEFENDANTS' MOTION TO DISMISS |

Plaintiff herein alleges a cause of action under Section 504 of the Rehabiliation Act of 1973, as amended, 20 U.S.C. §794, together with pendent state claims on California Labor Code §1420 and California Government Code §11135, for employment discrimination on the basis of handicap. On January 28, 1980, the motion of defendants Atascadero State Hospital and California Department of Mental Health to dismiss the complaint under Rule 12(b) came on for hearing. After considering the papers submitted and hearing oral argument, the Court concludes that the plaintiff's claims are barred by the Eleventh Amendment to the United States Constitution and that the complaint must be dismissed in its entirety.

In this discussion, consideration must first be given to the plaintiff's claim under 20 U.S.C. §794. With respect to that claim, the Eleventh Amendment prohibits federal courts from entertaining suits by private parties against states and their agencies. *Alabama v. Pugh*, 438 U.S. 781

(1978). Suits against a state brought by its own citizens are included within this prohibition. *Edelman v. Jordan,* 415 U.S. 651, 662-63 (1973). Congress may waive this immunity by authorizing suit against the state under a specific statute. However, waiver will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman* at 673.

Thus, the Court must examine section 794 to determine if there has been a waiver by Congress of the state's Eleventh Amendment immunity. An examination of section 794(a), which was added by amendment in 1978, is also required for the same purpose. That section provides that, "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . under section 794 of this title."

Careful analysis of both sections leads the Court to conclude that there is no evidence of Congressional intent to waive the Eleventh Amendment immunity for suits brought under section 794 or Title VI which is sufficient to meet the standard articulated in *Edelman, supra. Stemple v. Board of Education,* 464 F. Supp. 258, 262 (D.Md. 1979); *Stubbs v. Kline,* 463 F. Supp. 110, 115-16 (W.D.Pa. 1978). There is also no support for plaintiff's contention that the state defendants have consented to being sued in federal court by receiving federal assistance, *Edelman* at 673, or by agreeing to conform to federal law as a condition of the receipt of assistance. Therefore, the Eleventh Amendment operates as a bar to suit against the state agencies on the federal claim.

Defendants have argued as a second ground for dismissal that a suit for employment discrimination under 29 U.S.C. §794 must allege that the primary objective of the federal assistance received by defendants is to provide employment. Although plaintiff has not so alleged, the Court finds this argument unpersuasive. *Hart v. County of Alameda,* 21 Fair Empl. Prac. Cases 234 (N.D.Cal. 1979).

With respect to the claims under state law, the same analysis must be applied as in the case of the federal claim *Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573 (1946). There is no evidence before this court that the state has consented to suit against it in the federal court for violation of California Labor Code §1420 or for California Government Code §11135. The state may consent to suit in its own courts without consenting to suit against it in the federal courts. *Kennecott,* supra. In the opinion of this Court, the Eleventh Amendment bars the pendent state claims which also must be dismissed. Alternatively, having decided that the federal claim must be dismissed, the Court exercises its discretion to dismiss the pendent claims. *United Mineworkers v. Gibbs,* 383 U.S. 715 (1966). Accordingly, for the reasons stated above,

IT IS ORDERED that defendants' motion to dismiss the complaint is granted.

DATED: January 30, 1980

Mariana R. Pfaelzer

Mariana R. Pfaeizer
United States District Judge

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| DOUGLAS JAMES SCANLON, Plaintiff-Appellant, vs. ATASCADERO STATE HOSPITAL and CALIFORNIA DEPARTMENT OF HEALTH, Defendants-Appellees. | ) | No. 80-5201 ORDER |

The motion of defendants-appellees Atascadero State Hospital and California Department of Mental Health for stay of the mandate in this matter, pending application to the Supreme Court of the United States for a writ of certiorari, is hereby granted, and issuance of the mandate is stayed for a period of thirty days from and after August 4, 1984. If within that period there is filed with the Clerk of this court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari has been filed and that the case has been docketed in the Supreme Court, the stay granted by this order shall continue until final disposition of the case by the Supreme Court.

Ben C. Duniway

United States Circuit Judge

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

DOUGLAS JAMES SCANLON,
Plaintiff-Appellant,
v.
ATASCADERO STATE HOSPITAL and CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Defendants-Appellees.

No. 80-5201

ORDER

The motion of defendants-appellees Atascadero State Hospital and California Department of Mental Health for stay of the mandate in this matter, pending application to the Supreme Court of the United States for a writ of certiorari, is hereby granted, and issuance of the mandate is stayed for a period of thirty days from and after July 5, 1984. If within that period there is filed with the Clerk of this court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari has been filed and that the case has been docketed in the Supreme Court, the stay granted by this order shall continue until final disposition of the case by the Supreme Court.

Ben. C. Duniway

United States Circuit Judge

**PROOF OF SERVICE BY MAIL**

*State of California*

*ss.*

*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 31, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

U. S. SUPREME COURT
1 First Street, N.E.
Washington, D.C. 20543
*(Delivered: Original & 40 copies)*

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 31, 1984, at Los Angeles, California.

Robin J. McColgan
*(Original signed)*